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71-1387

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In the

Supreme Court of the United States

..... Term, 1972

No. .....

LEO M. HIKEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered on the above case on March 29, 1972.

OPINIONS BELOW

The Judgment of the District Court for the Eastern District of Missouri (Tr. 313, App. 227) has not been reported. The Opinion of the Court of Appeals for the Eighth Circuit attached as Exhibit "A".

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on March 29, 1972. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1291.

QUESTIONS PRESENTED

1. Whether Petitioner was denied a fair trial and the fundamental right to fully confront witnesses against him when the trial court restricted Petitioner's cross examination of a Government witness as to prior sales of securities at substantial gains so as to support Petitioner's own explanation of innocence.

2. Whether the United States violated Petitioner's 4th, 5th and 6th Amendment rights, when, after Petitioner had been released from the Federal Penitentiary, the United States through the Internal Revenue Service sent a Revenue Agent in lieu of a Special Agent to obtain incriminating evidence from Appellant without giving proper Miranda warnings and also misrepresented to Petitioner the nature of the investigation.

STATEMENT OF FACTS

Petitioner was born in Russia, on April 23, 1909 (Tr. 214, App. 160). Petitioner came to the United States in 1912 with his parents and settled in St. Louis, Missouri (Tr. 215, App. 160-161). In 1935 Petitioner entered into his own pharmacy business, and there began business activities which culminated in a series of events in 1964 and 1965 which caused Petitioner to be convicted of crimes involving Federal Drug Laws for which Petitioner was sentenced and served a fed-

eral jail term and for which the United States now contends that Petitioner by the same acts violated Section 7201 of the Internal Revenue Code of 1954 (Tax Evasion).[1]

NATURE OF PETITIONER'S BUSINESS

Petitioner first opened a small drug store on Minerva Avenue in St. Louis, Missouri. It was a small store which Petitioner operated himself and in which he kept his own books and records (Tr. 218-219, App. 162-163). This business failed shortly after opening and Petitioner began to work for Walgreen's Store as a pharmacist. (Tr. 220, App. 163-164). Between the failure of Petitioner's first independent venture and the opening of the drug store in question in this litigation, three or four years later, Petitioner worked for several drug store chains.

On April 23, 1941, Petitioner took over a small operating drug store later to be called Union Easton Drugs.

Between 1941, when Petitioner opened the store and 1959, Petitioner as he had in his initial venture handled all of the administration of the business, including the maintenance of books and records. In 1959 Mr. Ralph Bennett, who was a part-time bookkeeper, real estate dealer and business advisor, was employed by Petitioner to "keep books" for Peti-

[1] Petitioner was previously charged by indictment with the offense of selling amphetamines without prescriptions and entered a plea of guilty. Judge James Meredith, the Federal Judge presiding in the instant case, sentenced Petitioner at the initial trial which concerned the amphetamines to a term of months in the Federal Penitentiary.

tioner in the sole proprietorship called Union Easton Drugs. (Tr. 227, App. 167-169).[2]

BOOKS AND RECORDS AS MAINTAINED BY PETITIONER

The books and records maintained by Petitioner were rudimentary, unsophisticated, and unorganized (Tr. 227-229, App. 168-169; Tr. 36-54, App. 42-52). Petitioner used forms manufactured by E. I. Lilly (Tr. 227, App. 168, Government Exhibit No. 5) to record his purchases, sales and expenses. These forms purportedly provided for the keeping on a daily basis of a record of purchases and expenditures and also daily sales (Tr. 227, App. 168, Government Exhibit No. 5).

Petitioner was not consistent in his method of recording purchases, sales and expenses. Either daily or weekly, and sometimes semi-monthly, he would take his retained invoices for cash or check purchases and would record them in the record sheets described above (Tr. 228, App. 168-169). No real effort was made by Petitioner to insure that the system recorded the purchases accurately on the particular days the purchases were made, and many purchases were excluded from the record entirely. Many were included in subsequent weeks or months, and many were not included at all.

[2] "Keeping Books" by the bookkeeper Bennett amounted to no more than annual supervision of the books and records in what must be called a cursory manner and the preparation of tax returns. (Tr. 26-54, App. 40-52).

The sales were recorded basically as an estimate (Tr. 253-261, App. 183-189). Some computation based on purchases was probably used (Tr. 253, App. 183-189). Petitioner initially had a cash register in the store when he took it over in 1959, but the machine had no tape, and total sales could not be completed therefrom (Tr. 228-299, App. 168-169; Tr. 255-256, App. 184-185).

Cash disbursements were never verified and the check book was never completely reconciled.[3]

THE TAX RETURNS

In its opinion, the Appellate Court did not detail a resume of the pertinent facts stating that "it is sufficient to state that the Government presented an abundance of substantial

[3] There was some confusion as to the balancing of the checking account; Petitioner maintained that he never balanced his checkbook (which fact can be determined from the checkbook itself) but the Government brought out in cross examination that in many instances checks which were cashed by Petitioner for customers and deposited to Petitioner's account which "bounced" were, in fact, noted in some fashion in the checkbook. Petitioner indicated in his testimony that he rarely noted the returned checks in his checkbook, but rather, pulled the checks and put them in an envelope as the statements came in. The Government presented 8 or 10 checks out of the thousands received and obtained admission from Petitioner that each of the checks exhibited by the Government had, in fact, been noted in the checkbook as a check that had "bounced". A review of Petitioner's checkbook, however, would indicate that Petitioner rarely verified the accuracy of the bank's computation, and no real reconciliation of the checkbook ever occurred. A review of the checkbook would also indicate that most of the returned checks were, in fact, not noted in the checkbook. The sum total of Petitioner's handling of that check account was to understate for tax purposes the losses that he incurred with regard to bad checks he had received (Tr. 251, App. 181-184).

evidence from which the jury could find, as it manifestly did, that the returns for the three years in question were false and do not reflect Appellant's actual income". At trial Petitioner never contended that the books and records were true and correct and did reflect actual income. The Appellate Court went on to state "additionally, there was evidence which, viewed in a light most favorable to the Government, proved that Petitioner furnished the data and information used in preparing the returns knowing it to be false and inaccurate." The Appellate Court did not discuss whether or not Petitioner furnished the "false and inaccurate" information to the Bennetts "with the intent to" deceive the Government or cause the returns to be fraudulent.

THE BENNETTS

Petitioner used Ralph Bennett as his "bookkeeper" for many years (Tr. 37-54, App. 40-52). Mr. Bennett died in August, 1965 (Tr. 37, App. 41), and his wife, Mrs. Ruth Bennett who had assisted her husband, assumed the task of preparing tax returns and keeping the Petitioner's books as previously described.

Mrs. Bennett, as did Mr. Bennett, obtained the purchase, expense, and gross income figures from Petitioner (Apparently, in January of each year, on an annual basis) (Tr. 40, App. 42-43).

With regard to sales and exchange of securities, the Bennetts compiled these figures from the stock broker slip received by Petitioner and his wife (Tr. 40, App. 42-43). The Bennetts made out the quarterly 941 employment tax report based upon information supplied to them by Petitioner (Tr. 41, App. 43).[4]

The Bennetts did not make it their practice to use the check records of any client, as basic work material, and particularly Petitioner.

TESTIMONY OF MRS. BENNETT ON DIRECT EXAMINATION

Mrs. Bennett on Direct examination indicated that she noticed the purchases and sales of securities were in excess of "what he reported as income from his business" (Tr. 43-44, App. 44-46). On direct examination Mrs. Bennett was asked by United States attorney whether she had "occasion to have conversation with Mr. Hiken in 1965 regarding the

[4] There was an understatement of many items on the Income tax returns in question. These items were legitimate deductions, the omission of which on the return occurred either through inadvertance or design by either the Petitioner or the Bennetts. In either event, it would have been hard, had they examined their work product and Petitioner's records with an eye to accuracy, for the Bennetts not to notice certain of the understatements: sales tax (Tr. 163-168, App. 124-132); medical expense (Tr. 163, App. 125); Interest expense (Tr. 164, App. 126); Contributions (Tr. 162-163, App. 125); Employment Taxes (Tr. 170-172, App. 130-131); here the Court refused to allow comment as to the preparation by Mrs. Bennett of Form 941 concerning employment tax records and her obvious knowledge and constructive knowledge as to a discrepancy between the records and the return (App. 130-131).

extent of his investment in the stock market? (Tr. 43, App. 44) The following series of questions and answers occurred:
Answer: Mrs. Bennett. Yes.

Question: What occurred at that time?

Answer: Well, I was curious as to the loss on the stock, and at one time asked him where he got the money to play the stock market, and he joked and said he had a rich son-in-law in Texas.

Question: What caused you to wonder as to the source of this money?

Answer: Because there were so many losses.

Question: How were the losses in comparison to what he was reporting on his return?

Answer: Quite large. (App. 41)

The United States Attorney then went on to ask, "well, did you make any * * * were you able to make any comparison as to what he was spending in the market to what he was reporting from his business?"

Mrs. Bennett stated, "no Sir, because I thought maybe the stock transactions were from some private source, you know." (Tr. 44, App. 45).

COMMENTS OF THE APPELLATE COURT

The Appellate Court stated, "on cross examination Appellate's counsel sought to explore a stock transaction of Ap-

pellant which took place several years prior to the years involved in the prosecution." Objection to such cross examination was sustained on the ground that Appellant was attempting to inject collateral matters not the subject of direct examination. The Appellate court stated that "Petitioner does, however, assert that he was denied the right to fully cross examine the Government witness and consequently was deprived of a fair trial." The Appellate Court disagreed with Petitioner's contention stating that "we are not convinced that the trial court abused its discretion by refusing to allow cross examination *on a matter not explored on direct examination*, where it is clear that such cross examination *would have served only to inject a collateral issue in the case.*

On page 8 of Petitioner's brief to the Eighth Circuit, Petitioner stated: "It is basically unfair for the Court (below) not to allow Appellant to explain the statements of Mrs. Bennett as to her belief that there may have been resources that she thought were available for income production, whether there were any such sources or not. After all, the Government was attempting to show not only that there were none, but that Appellant knew that there were none and attempted, according to Government's theory, to mislead Mrs. Bennett. Appellant, in his brief pointed out how the "jury may not have believed Appellant actually tried to mislead Mrs. Bennett," and complained to the Court that the trial court did not let the jury ever find out whether or not there was reason to believe that both the Bennetts and Appellant could have thought that there were such sources of income.

RESTRICTED CROSS EXAMINATION

On cross examination of Mrs. Bennett, Appellant's counsel established first that Mrs. Bennett and Appellant were joking about the rich son-in-law as a source of funds, and that she understood that portion of the conversation to be a joke. (Tr. 49, App. 48). However, when counsel for Appellant asked Mrs. Bennett of her knowledge of Appellant's past financial records, i.e., large gains in Brunswick and other securities prior to 1965, in order to establish that Mrs. Bennett had knowledge of sources from which Appellant could have obtained this money and from which Appellant could have believed that it was not necessary to make sufficient monies in the prosecution years in order to spend the monies alluded to by the Government, the Government objected, arguing that Appellant's gains in prior years had no relevancy with regard to the Government's method of proof. (Tr. 49-51, App. 48-50) Counsel for Appellant explained to the Court "the Government's whole case is based on the idea that Defendant (Petitioner) should have realized he was spending money in 1965 that he did not have". It was Petitioners contention that large gains in the market prior to 1965 might be a fact that would cause Petitioner to believe that he did in fact have sufficient funds in the years in question with which to play the market and loose. It was Petitioner's contention that this diametrically opposed the thrust of the Government's chief argument. Counsel at trial pointed out, "we are not arguing about numbers. We are arguing about the knowledge of the taxpayer that he is spending more money than he is making." (Tr. 50, App. 48-50).

The Court sustained the objection and would not allow the Petitioner to go into the issue (Tr. 51, App. 50).

On the witness stand, Petitioner denied ever deliberately attempting to evade taxes. (Tr. 214-263, App. 160-190).

ARGUMENT

POINT I

WHETHER PETITIONER WAS DENIED A FAIR TRIAL AND THE FUNDAMENTAL RIGHT TO FULLY CONFRONT WITNESSES AGAINST HIM WHEN THE TRIAL COURT RESTRICTED PETITIONER'S CROSS EXAMINATION OF A GOVERNMENT WITNESS AS TO PRIOR SALES OF SECURITIES AS SUBSTANTIAL GAINS SO AS TO SUPPORT PETITIONER'S OWN EXPLANATION OF INNOCENCE.

Petitioner on the witness stand explained to the Court and jury as best he could why he did not realize from merely looking at his return that his income was understated. His testimony was spoken in somewhat broken English but the jist of it was simple. In essence, he stated that he had been working for some thirty odd years, that he had prior gains in the market and income from a life's work, and he assumed he had sufficient money to spend in the years in question. The Government on direct examination began a line of questioning which attempted to cause the jury to believe anyone looking at Petitioner's returns would immediately recognize that for the years in question, Petitioner did not report enough income to cover his expenditures during those years. It attempted to do this using Mrs. Bennett and having Mrs. Bennett narrate to the Court and to the jury how she noted that the losses in the stock market were "quite large" compared with what was reported on the tax return. In

the Closing Statement the United States attorney said clearly what the Government was trying to do. He stated: "but we have additional badges of fraud."

Mrs. Bennett asked him where he was getting all this money to blow in the market. Where did all that money come from? He was spending more on the market than he was declaring as income. He put it off with a response about a rich son-in-law in a joking response. But certainly he was on notice." The United States attorney went even further and stated, "Now the comparison chart also shows you the willfulness in this case. Look at the amount of the expenditures as compared to what he said he made. These are indications of knowledge, the knowledge as he went along, that he had this money, and he truly had this money, and that he had to pay tax on it."

The United States attorney went even further in hammering on the comparison theory and stated, "The man isn't blind, ladies and gentlemen, you can not declare an $8,000 income and spend $33,000. The man isn't that blind." (App. 196-197).

Counsel for Petitioner explained to the Court that the Government's whole case was based on the idea that Defendant, (Petitioner) should have realized that he was spending money in 1965 that he did not have. It was Petitioner's contention that large gains in the market prior to 1965 might be a fact that would cause Petitioner to believe that he did in fact have sufficient funds in the years in question with which to play the market and lose or spend money he had. This contention would controvert the thrust of the

Government's chief argument. In addition, it would further put in context, explain, or possibly do away with whatever inference the Government was attempting to raise in the minds of the jury by Mrs. Bennett's testimony on direct examination. Appellant's counsel pointed out to the Court (Tr. 50, App. 48-50) and to the Eighth Circuit in the Petitioner's Brief, page 9, "we are not arguing about numbers, we are arguing about the knowledge of the taxpayer that he is spending more money than he is making."

The Court sustained the objection of the Government and would not allow the Appellant to go into the issue. (Tr. 51, App. 50). The Eighth Circuit affirmed that decision finding (a) that the matter was not explored on direct examination (an erroneous determination), (b) that it was "clear" such cross examination would have served only to inject a collateral issue in the case (an erroneous conclusion) and (c) that Petitioner "failed to demonstrate any prejudice in the Court's ruling", a conclusion that cannot be supported from the record.

The Government argued that the evidence was irrelevant merely because under the Government's theory of proof, i.e., bank deposit method, the proof was not necessary from the Government's side. In addition, it argued that it was not relevant. The Appellate Court added failure to find prejudice.

Petitioner submits that the Government, the District Court and the Appellate Court missed the point. Petitioner said, in essence, "I didn't know I was not reporting all of my income." The Government argued that Petitioner should have detected the understatement when he saw the taxable

income to be so small compared to his expenditures for the year.

Petitioner replied that the large expenditures that the Government is referring to had to do with stock market losses, the balance being normal expenditures similar to those made in the past throughout his life. Petitioner states that in prior years he had made a substantial gain in the market, trading in stocks, particularly Brunswick, and he was under the impression that he had ample money to cover the large losses in the market. Petitioner submitted that the large gains in the earlier years tended to obscure the effect that the comparatively small earnings reported on the tax return would have on him.

The thrust of Appellant's argument is that he is entitled to prove that there were circumstances existing that made it reasonable for him to fail to perceive that the small amount of income reported in 1964, 1965, 1966 was inconsistent with reality, as argued by counsel for the Government. When Mrs. Bennett was asked about just such a point, by the Government, Petitioner was entitled to cross examine this woman and show that she as well as Petitioner knew of the existence of large gains in Brunswick stock in earlier years and that she really was not that impressed by the smallness of the reported income in the years in question primarily because of large gains in the market in the earlier years.

Petitioner wanted to prove the large gains in the earlier years to prove that not only they existed and that he knew about them but that Mrs. Bennett knew of them as well.

Moreover Petitioner did not bring out the point. The government did. It brought it up with Mrs. Bennett's testimony and continued on with the argument throughout the trial and the closing argument. Petitioner had the right according to the Constitution to fully confront each witness who testified against him.

If Appellant had earned larger amounts in earlier years in the market, and if Appellant was under the impression that he still had money or funds or assets available to him to allow him to live and spend as he did notwithstanding the substantial underearnings of the income during the years in question, he should be allowed to state his beliefs as he had them in the years in question and prove the existence to gains to buttress his arguments. Cross examination of Mrs. Bennett along the lines of what she knew as to the large gains should have been allowed. It is submitted that it was unfair not to allow Petitioner to cross examine each person who testified detrimentally to him particularly in a tax case when the issue is lack of criminal intent.

In hotly contested cases, such as this, if the Petitioner had proved to the jury that there were gains in earlier years, this would be ample reason to believe his contention as to why he failed to see the large problem created by the small amount of income reported in the returns in question and also to allow the jury to understand the testimony of Mrs. Bennett and possibly not regard it as damaging.

It should be pointed out that an earlier jury failed to agree on Petitioners guilt or innocence. Petitioner testified in this case and there were many possibilities of innocence. The returns were inaccurate in several areas. Some of the items caused an over-reporting of income and some caused an under-reporting of income. For example, all medical deductions were not taken, the insurance deduction was too low, interest deductions were too low, the employment taxes paid were possibly understated, and purchases were understated.

Surely the jury could see the case differently from the Government and to believe Appellant in his allegation that he was negligent rather than fraudulent and that the return was inaccurate because he was negligent in the way he handled his business, and that the small amount of tax reported on the returns, coupled with the sales and losses in the market, did not have a great deal of impact on him merely because of the large gains he had made in earlier years.

The Courts have consistently held that where the intent of the accused is at issue, he may testify as to what his intent was. *Hartman v. United States*, 250 F. 2d 386 (C.A. 8). It was Appellant's right to have proof of facts tending to substantiate his claim.

In *Brown v. United States*, 411 F. 2d 1134 (C.A. 10, 1969) the Court states:

> "The critical issue to be determined by the jury in this case was not a determination of acts alone (by the Defendant) but whether such acts * * * were done with

> a specific intent to violate * * * (the Internal Revenue laws) * * * Holland v. United States, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150; McCarthy v. U. S., 409 F. 2d 793 (C.A. 10th, 1969); Peterson v. U. S., 268 F. 2d 87 (C.A. 10th).
>
> "Accordingly, the accused, as part of his defense is entitled to wide latitude in the introduction of evidence which tends to show lack of specific intent."

The Court goes on to quote from *Hoyer v. U. S.*, 23 F. 2d 134, 139 (C.A. 8), and states

> "Evidence on the question of intent where that is material may take a wider range than is allowed in support of other issues, otherwise there would be no means to disclose the purpose of the act charged in which the very jist of the offense may consist * * *"

It is submitted that the government was granted a large scope in its circumstantial proof in this case. The Court's restriction in proof by Appellant as to the cross examination of Mrs. Bennett was unduly restricted and dramatically prejudicial and violated Defendant's rights to confront the witnesses testifying against him. *Watkins v. U. S.*, 287 F. 2d 932 (C.A. 1, 1961). See also *U. S. v. Augustine*, 189 F. 2d 1587 (C.A. 3); *Ford v. U. S.*, 210 F. 2d 313 (C.A. 5).

POINT II

THE UNITED STATES VIOLATED PETITIONER'S 4TH, 5TH AND 6TH AMENDMENT RIGHTS WHEN, AFTER PETITIONER HAD BEEN RELEASED FROM THE PENITENTIARY, THE UNITED STATES SENT A REVENUE AGENT IN LIEU OF A SPECIAL AGENT TO OBTAIN INCRIMINATING EVIDENCE FROM PETITIONER WITHOUT GIVING PROPER MIRANDA WARNINGS AND ALSO MISREPRESENTED THE NATURE OF THE INVESTIGATION.

Prior to the trial of this case, Petitioner was prosecuted and convicted of selling drugs without a prescription. These alleged illegal activities were occurring on or about the time of the alleged offense having to do with federal income taxes in the instant case was supposedly committed. This alleged criminal activity in the drug store was the supposed source of the so-called unreported income. Petitioner was not investigated for tax purposes prior to his conviction with regard to the pharmaceutical violation but rather shortly after his release from the federal penitentiary.

When initially informed of this investigation by Mr. Roberts, the Internal Revenue Agent, Petitioner's first question to agent Roberts at Petitioner's place of business was, "Does this mean I will have to go back to jail"? Agent Roberts replied that he did not know whether or not Petitioner would have to go back to jail. (Tr. 61, App. 56).

There can be no questions but that Agent Roberts was asked a fairly specific question and that it is submitted that Agent Roberts sidestepped the question and intentionally mislead the Defendant. It is submitted at this point Agent Roberts can not "in good conscience" fail to reply to the Defendant's question and remain silent. Silence can be equated with fraud when there is a legal or moral duty to speak or where there is an inquiry left unanswered which when unanswered would be misleading. *U. S. v. Pruden*, 424 F. 2d 1021 at 1032 (C.A. 5, 1970).

Cases have held that the mere failure of a revenue agent be he a regular agent or special to warn the taxpayer that the investigation may result in criminal charges, absent any

acts by the agent which materially misrepresent the nature of the inquiry, do not constitute fraud, deceit and trickery. *U. S. v. Pruden,* supra. This is not the case where the agent merely failed to apprise the taxpayer of the situation. Here the agent was asked a specific question which indicated the taxpayer's apprehension. The agent certainly at this time knew a criminal case was likely to result and failed to respond to the specific questions put to him by the taxpayer.

Pruden supra tells us that "any reasonable person is bound to be aware that the filing of an incorrect tax return may result in a charge of wrongdoing". The taxpayer having gone to prison for a wrongful act now being confronted by a government agent obviously was interested in whether or not the agent was out there to ascertain facts which might send him back to jail and so asked the agent. As *Pruden* supra, indicates, "the appearance of a revenue agent at the door, in itself ought in no way to dispell this knowledge of a potential criminal charge." Rather, when the agent says he is there to examine the taxpayer's books, the taxpayer's concern should intensify". It is submitted that in this particular case it did immediately intensify and the taxpayer was seriously concerned with whether or not the agent was there to "put him in jail", or find him guilty or attempt to find him guilty of criminal wrongdoings.

It is submitted that if Petitioner knew that he was suspected of criminal conduct, conduct which would have sent him back to jail, he would have immediately availed himself of counsel, because he did so immediately upon being so notified at later stages of the investigation. It is submitted that

counsel would have immediately advised Petitioner of the consequences of waiving his constitutional right and the consequences of divulging further information, and probably would have caused the disclosures to stop. Petitioner on his own even without counsel, might have refused to divulge the information had he been properly answered as to his question concerning the nature of the investigation. One thing in this regard is certain and that is Petitioner cooperated with the Internal Revenue Agent giving what must be recognized as damaging information, and he did so only after he questioned Agent Roberts about the possibility that he would end up in jail.

Looking at the Government's overall conduct in this investigation rather than at the specific refusal of Agent Roberts to respond to specific questioning of the Petitioner, Petitioner submits that under the circumstances the Government obviously suspected that Petitioner had committed a tax crime from the beginning of the tax investigation. The Government dispatched an Internal Revenue Agent to question Petitioner in lieu of Special Agent, and its only reason for doing so was to conceal the true nature of the investigation from Petitioner and to obtain as much information from Petitioner of an incriminating nature as possible prior to the time Petitioner was confronted with a Special Agent. It is submitted that the Government knew that a Special Agent would probably bring forth a lawyer in Petitioner's behalf and consequently make the uncovering of the evidence in the case more difficult. Agent Roberts was not a novice Internal Revenue Agent and obviously was doing everything

in his power to uncover as much evidence against the Petitioner as possible before bringing a Special Agent in the case.

It is submitted that this particular conduct on behalf of the Government does amount to stealth. Evidence obtained by stealth is subject to a motion to suppress. All the evidence the Government obtained from Petitioner, including that which was obtained through leads, should have been suppressed as evidence in a court, and that which was taken from Appellant should have been returned to him. *U. S. v. Manno*, et al., 45 Aftr. 2d 655; *Goulad v. U. S.*, 255 U.S. 298 at page 305, 41 S. Ct. 261, 65 L. Ed. 647.

It is difficult to conclusively prove that the Government did, in fact, use Agent Roberts as an instrument of deceit, but there are sufficient facts from which it would be difficult to draw an inference other than that. The Petitioner had sufficient contact with the Government prior to the beginning of the investigation referred to above and, in fact, was incarcerated in a federal penitentiary. Because Petitioner went back in the same business that he was in prior to his incarceration, and was still in possession of substantial assets, it is submitted that there was sufficient reason to cause the Intelligence Division of the Internal Revenue Service to want to obtain a great deal of information about Petitioner's financial situation as soon as possible after his release. More important, Petitioner's relationship with the Government, i.e., the fact that he was in jail partly before the investigation and a probation report of the probation officer investigating him was in the possession of the United States suggests that there was ample reason to subject him to criminal

investigation by the Internal Revenue Service. It would be only natural to presume that the Internal Revenue Service wanted to know if Petitioner had reported any money that he supposedly obtained from the sale of any of the items without prescriptions and whether or not there were any federal tax violations. Going one step further, it is submitted that even after the Internal Revenue Agent, in his "routine audit" uncovered facts casting suspicion on the taxpayer of tax evasion or of other crimes, he obtained further evidence from Petitioner without the proper constitutional safeguards denying Petitioner his constitutional rights.

During the course of the investigation Agent Roberts uncovered evidence suggesting that Appellant had deposited substantial amounts in the bank in excess of those reported on his federal income tax return.

The instant prosecution is based on the alleged criminality of that particular activity.

What is the duty of the investigating agent at that point of his investigation where there arises a suspicion of criminal fraud by the taxpayer? At the time Agent Roberts allegedly discovered the first large deposit of funds in the bank account, was there a suspicion of fraud raised in his mind?

It is Petitioner's contention that Agent Roberts' subsequent conduct makes it quite clear that he did suspect fraud, and that he was bent upon proving it prior to the time he completed his audit. Agent Roberts continued his investigation for quite some time in order to ascertain the facts surrounding the bank deposits and comparing those de-

posits and the items reported on the federal income tax return. As a matter of fact, all the Internal Revenue Service found out about Petitioner's activities was learned during the initial stage of the investigation by Agent Roberts. Rather than determining these facts surrounding the bank deposits with the use of a Special Agent, Agent Roberts continued to search and find all of the amounts in question and to "nail the lid on the case" by ascertaining the existence of deposits and expenditures and attempting to find out their exact amount and their source from the Petitioner.

It can hardly be said that Agent Roberts was doing anything other than attempting to accumulate additional information from the books and records of the Petitioner and from conversations with Petitioner which would solidify the Government's case against Petitioner in a criminal action.

It is apparent that Petitioner continued to cooperate with the Internal Revenue Agent, giving what must be recognized as damaging information. One other thing is certain. That is that Appellant, would not have continued along the lines of cooperation had he known the suspicions of the Agent and his real intentions at the time the investigation began and through its continuation.

Why did Agent Roberts remain silent when he was initially questioned about the criminal nature of the investigation and the possibility of Defendant going to jail and why he did not indicate to Petitioner that there was a distinct possibility that Petitioner would end up in jail. What was the purpose of remaining silent about Petitioner's precarious position in light of Petitioner's question if not to mislead

him? Also, what was the purpose of remaining silent about the discovery of major findings of substantial bank deposits in excess of those reported in the Federal Income Tax return if the purpose was not to mislead and conceal. Petitioner contends that the United States Agents had no right to conceal or mislead him about anything during the course of the tax investigation. *U. S. v. Pruden*, supra.

Petitioner further contends that he had a right under the 6th Amendment to the Constitution of the United States to be represented by counsel, at least from the time Agent Roberts had satisfied himself that there was a substantial possibility of unreported income and also from the very beginning of the tax investigation at his place of business. *U. S. v. Schoenberg*, 19 Aftr. 2d 348.

It is submitted that there is no choice to a Defendant with regard to giving information and waiving constitutional rights unless he is made aware of the actual nature of the investigation at that crucial time when the investigation turns from civil to criminal. The real issue, then, is whether Petitioner was induced to incriminate himself by a combination of ignorance of his rights in the course of atmosphere of the tax investigation itself, as well as the fact that Petitioner had just recently been released from the federal penitentiary. In some respects, the routine tax investigation is more insidious and dishonest in effect that custodial interrogation conducted in jail. If the Defendant is in jail and custodial interrogation is conducted, the suspect in custody fairly well knows his interrogators are seeking evidence with respect with which to convict him of a crime. On the outside,

a tax suspect is permitted and even encouraged to believe that no criminal prosecution is contemplated against him, as was done in the instant case. A more significant factor than in other reported cases. See for example *U. S. v. Tursynski*, 268 Fed. Supp. 847, 20 A.F.T.R. 2d 5004.

One would have to close one's eyes to the facts if one were to assume that Agent Roberts was really candid with this Petitioner when he indicated to Petitioner that there was no real likelihood that he would have to return to jail because of the investigation being initiated by Agent Roberts.

It is clear as was pointed out in *Pender supra, Mathis v. U. S.* makes it clear that Miranda is potentially applicable to any tax investigation but it most definitely does not require Miranda warnings in all tax investigations. The Court goes on to state that Mathis does not diminish the necessity for showing actual or inherent compulsion to self-incrimination. The Court pointed out that Mathis was deprived of his liberty in a most positive way. The Pruden case was concerned with the extension of Mathis to situations where "compulsion" was inferred from the fact that the investigators represented "Governmental authority in an adversary situation," an over-broad expansion of the rule according to Pruden. However, Pruden does make it clear that an atmosphere which compels the disclosure of criminal conduct, i.e., if the type of "custodial interrogations" that Miranda referred to are "questioning initiated by law enforcement officers after a person has been taken into custody or *otherwise deprived of his freedom in any significant way*. Pruden

recognized that "custodial interrogation" can occur beyond the confines of the station house." *Orosco v. Texas*, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969). Orosco according to Pruden states the rules. They are that (a) "a compelling atmosphere" can exist outside the station house, and (b) that a significant deprivation of freedom or compelling atmosphere must exist for Miranda to apply Pruden Supra, page 1029.

The circuit courts that have applied the Mathis case adversely to the taxpayers did so it is submitted, under the theory that tax cases differ from other federal criminal prosecutions in that in most other crimes it was known that a crime had been committed and that the real question remaining was who committed that crime. In tax cases the suspect was known, and the issue was only whether a crime had been committed.

The distinction, it is submitted, has no real significance since in any criminal prosecution the essential elements of a crime must be proved by the Government, and it is just as important to the Petitioner that he supply none of these himself "out of his own mouth, ignorantly". It is further submitted that this false premise was a fiction devise by the courts as an instrument to allow them to distinguish between tax cases and other criminal prosecutions for the sole purpose of excluding the application of the Miranda and Escobedo doctrines from tax crimes (*Miranda v. Arizona*, 384 U.S. 456, (1966); *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. The real reason for the holdings was

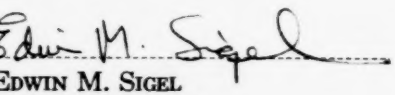
administrative difficulties envisioned in further tax prosecutions as opposed to substantive constitutional rules.

For the reasons stated above, the evidence obtained by the United States from Petitioner were in violation of his constitutional rights and should have been suppressed as evidence and its use forbidden in any criminal proceedings against Petitioner, which was not done in the instant case.

CONCLUSION

For the reasons given, Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that service of this Petition for Certiorari has been made on opposing counsel by mailing five copies thereof on this 27th day of April, 1972, in an envelope with postage prepaid properly addressed to them as follows: Daniel Bartlett, Jr., United States Attorney, Eastern District of Missouri, 1114 Market Street, St. Louis, Missouri, 63101. Solicitor General of the United States, United States Department of Justice, Washington, D. C. 20530.

Edwin M. Sigel

Edwin M. Sigel

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 71-1386

UNITED STATES OF AMERICA,

Appellee,

v.

LEO M. HIKEN,

Appellant.

March 29, 1972.

Appeal from the United States District Court for the Eastern District of Missouri

Before MATTHES, Chief Judge, LAY and Ross, Circuit Judges.

PER CURIAM.

Appellant was found guilty under a three-count indictment of filing false and fraudulent income tax returns for the years 1964, 1965 and 1966, in violation of 26 U.S.C. § 7201. The district court sentenced appellant to three years on each count and provided that the sentences were to run concurrently.

Appellant does not directly challenge the sufficiency of the evidence to make a submissible case. Therefore, we forego a detailed resume of the pertinent facts. It is sufficient to state that the Government presented an abundance of substantial evidence from which the jury could find, as it manifestly did, that the returns for the three years in question

were false and did not reflect appellant's actual income. Additionally, there was evidence which, viewed in the light most favorable to the Government, proved that appellant furnished the data and information used in preparing the returns knowing it to be false and inaccurate.

Appellant does, however, assert that he was denied the right to fully cross-examine a Government witness and consequently was deprived of a fair trial. We disagree.

The lady who had prepared the income tax returns for the years in question and prior years testified that appellant furnished the data, such as the amount of his income, the source thereof and deductible expenditures and, based upon such information, she prepared the returns. On cross-examination appellant's counsel sought to explore a stock transaction of appellant which took place several years prior to the years involved in the prosecution. Objection to such cross-examination was sustained on the ground that appellant was attempting to inject collateral matters not the subject of direct examination. To be sure, cross-examination is a fundamental right demanding great respect, but regulation of the extent and scope of cross-examination must generally lie within the discretion of the trial court and reversal is warranted only where an abuse of discretion leads to prejudice. *United States v. Seeverts*, 428 F. 2d 467, 468 n. 1 (5) (8th Cir. 1970); *Smith v. United States*, 407 F. 2d 356, 359 (8th Cir.), cert. denied, 395 U.S. 358 (1969); *Howard v. United States*, 389 F. 2d 287 (D.C. Cir. 1967).

We are not convinced that the trial court abused its discretion by refusing to allow cross-examination on a matter not explored on direct examination, where it is clear that such cross-examination would have served only to inject a collateral issue into the case. Appellant has wholly failed to demonstrate any prejudice from the court's ruling.

Appellant's second and remaining claim of error is that his Fourth, Fifth and Sixth Amendment rights were violated when "after appellant had been released from the federal penitentiary, the United States sent a Revenue Agent in

lieu of a Special Agent to obtain incriminating evidence from appellant without giving proper Miranda warnings." This contention must be rejected. It is abundantly clear that appellant was not in actual or constructive custody on the occasions when he was interrogated by the Internal Revenue Agent. These interviews took place in appellant's drug store. We have held that neither the *Miranda* nor *Escobedo* case applies to non-custodial interrogations involving investigation of possible violations of the Internal Revenue laws. *United States v. MacLeod*, 436 F. 2d 947 (8th Cir.), cert. denied, 402 U.S. 907 (1971); *United States v. Brevik*, 422 F. 2d 449 (8th Cir.), cert. denied, 398 U.S. 943 (1970); *Cohen v. United States*, 405 F. 2d 34 (8th Cir. 1968), cert. denied, 394 U.S. 943 (1969).

Appellant received a fair trial, he was represented by competent counsel of his own choosing, the verdict is responsive to strong evidence, and the judgment should be and is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1387

LEO M. HIKEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1972. The petition for a writ of certiorari was filed on April 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in forbidding cross-examination of a prosecution witness on a point not raised in the course of the direct examination.

2. Whether petitioner was given timely warnings of

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his rights in the course of an investigation of his tax liabilities by Internal Revenue Service agents.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954 provided:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall * * * be guilty of a felony * * *.

STATEMENT

Petitioner was convicted of attempting to evade his income taxes for 1964, 1965, and 1966, in violation of 26 U.S.C. 7201 (R. 15–16).[1] Petitioner reported a total of $4,725.15 in taxable income for the three years; the government's reconstruction of petitioner's income by the bank deposits method[2] tended to prove that he failed to report additional taxable income totaling approximately $61,000 (R. 112–113) and additional tax liability totaling $16,543.54 for the same three years (R. 151–152). Petitioner was sentenced to three years' imprisonment on each count, sentences to run concurrently.

In the course of an Internal Revenue Service audit of his personal income tax return for 1966, petitioner furnished his bank and retail drug store records to

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[1] "R" references are to the appendix in the court below.

[2] The bank deposits method is a recognized way of reconstructing income of a taxpayer whose records are inadequate or unavailable. *United States* v. *Frank*, 245 F. 2d 284, 287 (C.A. 3), certiorari denied, 355 U.S. 819; *United States* v. *Doyle*, 234 F. 2d 788 (C.A. 7), certiorari denied, 352 U.S. 853.

the revenue agent, who advised petitioner that his bank deposits appeared to be far in excess of his business receipts (R. 55, 63). On several occasions during the audit, the revenue agent asked petitioner what other sources of funds might account for the discrepancies, but petitioner was unable to suggest an answer (R. 55–57). On the second such occasion, petitioner asked if he would have to go to jail concerning this matter, and the revenue agent said he could not answer the question (R. 56). Thereafter, petitioner continued to furnish records to the revenue agent (R. 56–57). Subsequently, the case was assigned to a special agent of the Intelligence Division, who advised petitioner of his rights (R. 67). Petitioner supplied additional records to the special agent (R. 72), and he furnished the agent with information on stock brokerage accounts which petitioner said represented trading activity by his wife (R. 72, 75, 120–121, 148).

Petitioner's tax returns were prepared by an accountant from "final figures" supplied by petitioner (R. 43). The accountant noted that petitioner's 1965 return showed a $7,600 loss from the sale of securities, as compared with $7,500 in reported income from his business (R. 45). The accountant asked petitioner the source of the money lost in stock transactions (R. 43–44) as well as the source of his large bank deposits, including one deposit of over $9,000 (R. 46–47). As to the source of the stock investment money, petitioner "jokingly said he had a rich son-in-law in Texas" (R. 44) and he "didn't know" why some bank deposits were so large (R. 47). The testimony of the accountant did not touch upon the petitioner's financial

transactions in prior years. Accordingly, the district court sustained an objection by the prosecutor to cross-examination of the accountant as to her knowledge, if any, of a reputed large capital gain prior to 1965 (R. 48–49).

The court of appeals affirmed (Pet. A1–A3). It held that the limitation of the cross-examination of the accountant did not constitute an abuse of discretion because the cross-examination would have introduced a collateral issue which had not been covered on direct examination. It also held that petitioner was not in actual or constructive custody when first interviewed by the revenue agent and that that interrogation was not subject to the requirements of *Miranda* v. *Arizona*, 384 U.S. 436, and *Escobedo* v. *Illinois*, 378 U.S. 478.

ARGUMENT

1. There is no merit in petitioner's contention (Pet. 11–17) that the limitation on cross-examination of the accountant was erroneous. Petitioner was not probing the credibility of the accountant's testimony. Cf. *Alford* v. *United States*, 282 U.S. 687. He was seeking, rather, to establish the defense that he had, or might have had, capital gains in prior years which could have led him to believe that his stock investments in the prosecution years were out of prior accumulations rather than out of his current income (R. 49). The district court's ruling was therefore proper as an exercise of discretion, not only to keep cross-examination within bounds, *i.e.*, limited to matters covered on direct examination of the witness, but also to prescribe the order of proof. *United States* v.

Horastein, 176 F. 2d 217, 220–221 (C.A. 7); *United States* v. *Bender*, 218 F. 2d 869, 873–874 (C.A. 7). See generally McCormick, *Evidence*, Sections 24, 27, 29 (2d ed. 1972). Petitioner had full opportunity to present this defense in his own testimony, or by calling the accountant as a defense witness, producing brokerage records of prior gains, examining the investigating agents as to the inclusion in the bank accounts of funds derived from stock market transactions, and so forth. Under these circumstances, petitioner clearly was not prejudiced by the ruling of the district court.

2. There is no merit in petitioner's contention (Pet. 17–27) that the government used the revenue agent "as an instrument of deceit" (Pet. 21) to obtain incriminating admissions and records from him. Petitioner, aside from pure speculation and conjecture, relies solely on the fact that the revenue agent said he could not answer petitioner's inquiry whether he would have to go to jail "for this." At the time of this exchange, on January 22, 1968, the agent was aware only of an apparent excess of bank deposits over petitioner's reported receipts for 1966 (R. 55–56). It was not until later that the revenue agent discovered a similar pattern for 1965 (R. 56), and the 1964 pattern was examined after the special agent entered the investigation (R. 72).

In only developing sufficient evidence to justify a referral to the Intelligence Division for consideration of a fraud investigation, the revenue agent was not required to provide *Miranda* warnings. *United States* v. *Lockyer*, 448 F. 2d 417, 421–422 (C.A. 10). As

noted in its opinion (Pet. A–3), the court below, and other circuits generally, have held that such warnings are not required in non-custodial interrogations involving possible internal revenue law violations. See *United States* v. *Jaskiewicz,* 433 F. 2d 415, 420 (C.A. 3), certiorari denied, 400 U.S. 1021, and the other cases cited therein. Contra: *United States* v. *Dickerson,* 413 F. 2d 1111, 1116 (C.A. 7). While admissions procured by deceit which misrepresents the nature of an investigation are not considered voluntary, such deceit must stem from affirmative misrepresentations by the agents. *United States* v. *Tonahill,* 430 F. 2d 1042, 1044 (C.A. 5), certiorari denied, 400 U.S. 943. No such acts of deceit occurred in this case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972